Supreme Court, U.S.
FILED
NOV 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-173

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

RICHARD PAGE HARRIS,

Petitioner,

-vs-

ATTORNEY GENERAL OF VIRGINIA,
ET AL.,

Respondents

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO GRANTING OF WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT - AT RICHMOND

Richard Page Harris, PRO SE
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PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO GRANTING OF THE WRIT OF CERTIORARI

TO THE HON. CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PREMLIMINARY STATEMENT

Petitioner, RICHARD PAGE HARRIS, hereby respectfully moves this Honorable Court to grant the Petition for Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit, at Richmond, entered 10th June, 1986, based on the pleadings heretofore submitted following a determination that the substantial issues heretofore presented, meet all the prerequisites of the Court's Certiorari jurisdiction under Rule 17(a) (c), Rules of the Supreme Court of the United States, as amended.

OPINIONS BELOW

Unreported decision of the United States District Court, Western District of Virginia, entered on September 17, 1985, Hon. James H. Michael, Jr., District Judge, has heretofore been submitted as Petitioner's APPENDIX (C), annexed to the Petition for Writ of Certiorari. SEE: A5-A9, Id.

Opinion of the United States Court of Appeals for the Fourth Circuit, at Richmond, entered June 10, 1986, has been heretofore submitted as Petitioner's APPENDIX (A). SEE: A1-A2, Id.

Denial of Rehearing in the Court of Appeals, entered on July 8, 1986, has heretofore been submitted as Petitioner's APPENDIX (B). SEE: A3-A4, Id.

JURISDICTIONAL STATEMENT

The decisions of the Courts below relied upon Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir. 1985), wherein the Court admitted that clear and complete conflict exists between the Circuits on the central issue presented in the pending Petition for Writ of Certiorari.

WHEREFORE, Petitioner respectfully invokes the provident provisions of Rule 17(a) and (c), Rules of the United States Supreme Court and 28 U.S.C., section 1254(1), as governing the present proceedings.

STATEMENT OF FACTS

Respondent, by counsel, has heretofore presented additional facts to those presented in the Petition for Writ of Certiorari but has not alleged that these facts are dispositive of the issues presented so as to furnish any cause for the denial of the writ.

Respondent has, however, sought to evade the significance of the facts implied in their addendum to the Petitioner's Statement of Facts presented in the Petition through claims that:

"The prosecutor for the City of Staunton received notice of Harris' anticipated arrival in Virginia from Roanoke County offficials, who had sought temporary custody of him under Article IV of the IADA. (Res. App. A14-A15). The City of

Staunton—some 90 miles from Roanoke—then requested that it receive temporary custody of Harris after the disposition of the charges pending against him in Roanoke County. (Resp. App. A-10-A13)." SEE: Respondent's Brief, at page (4), Id.

This admission therefore establishes as a fact from the Respondent's statement, that Petitioner was tried without a detainer having been previously filed against him by the City of Staunton, and that the City of Staunton therefore gratuitously or fortuitously, obtained custody of Petitioner without having jurisdiction under the Interstate Agreement on Detainers Act, Article IV to remove Petitioner from federal custody for the purpose of trial in the City of Staunton. SEE: Respondent's Brief, Id. at page (4).

Facts established in Respondent's own Appendix and substantiated by the actual documents referenced to therein, belie the claim that the City of Staunton did not file a detainer against Petitioner. SEE: Respondent's Appendix A10-11, establishing as follows:

> "I hereby accept the offer of temporary custody of Richard Page Harris, a/k/a James William Maddox, WHO HAS A CRIMINAL WARRANT LODGED AS A DETAINER AGAINST HIM FOR A FELONY . . . bad check and auto larceny IN THE CITY OF STAUNTON, VIRGINIA, OF WHICH I AM THE COMMONWEALTH'S ATTORNEY (prosecutor)."

Petitioner Harris has further furnished evidence indisputably establishing that the detainer was filed by the City of Staunton in addition to the evidence of Respondent's own Appendices. SEE: Petitioner's Appendix (E), herein. at A-1, Supplemental.

Respondent has also admitted that on November 21, 1983, the Circuit Court of Roanoke County, dismissed the indictment against Petitioner, but fails to advise the Court that the said dismissal followed final determination by the said court that a violation of Article IV of the Interstate Agreement on Detainers, had accrued. SEE: Respondent's Brief, at page (5), Id.

Nor did Respondent advise or admit therein that the City of Bristol, following a determination that Article IV of the I.A.D. had been violated,

likewise dismissed pending indictments against Petitioner in accordance with the said provisions and that only the City of Staunton, which had tried Petitioner AFTER Roanoke County, had nevertheless refused and failed to find what had already been determined by Roanoke County Circuit Court. SEE: Respondent's Brief, at page (5-6), Id.

MOREOVER, Respondent has failed to note the significance of the trial court's determination which was based not on the provisions or considerations of the Interstate Agreement on Detainers Act, but the analogous and inapposite provisions of Virginia's speedy trial statute. SEE: Respondent's Appendix A-20, wherein it is established that the trial court held, INTER ALIA, that:

"The Court will deny them and in this regard, though the motion was addressed to the claim of entitlement to have these dismissed under the Detainer Act, the court would also note that under the Virginia statutes as to speedy trial, that the proceedings are within that time limit, probable cause having been found July 25 of 1983." SEE: Respondent's Appendix A-20, Id.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1.

Whether dismissal of pending indictments following determination of violation of IADA Article IV (c) and V (2) (c) is required under Carchman v. Nash, 473 U.S. ___, 105 S.Ct. 3401, 87 L.Ed. 2d 516 (1985) and conflicts between the Circuits ought to be resolved thereto?

Respondent, by counsel, has not disputed that (i) the holding of the United States Court of Appeals in Kerr v. Finkbeiner (4th Cir. 1985), established that there were conflicts among the Circuits as to the precise sanctions to be imposed following

determination that Article IV(c) and V (2) (c) of the Interstate Agreement on Detainers Act had been violated by a receiving state.

Nor has Respondent denied, that such conflicts as noted by the Court of Appeals squarely merit the use of this Court's certiorari jurisdiction to resolve the issues which are presented challenging the conflicting determinations of the Courts below. (ii)

(iii) Nor has Respondent denied that since the decision in Kerr v. Finkbeiner, supra, preceded this Court's holding in Carchman v. Nash, 473 U.S. __, 105 S.Ct. 3401, 87 L.Ed. 2d 516 (1985), therefore the Court of Appeals did not have any opportunity to determine the effect of this Court's holding in resolving these conflicts noted in Kerr v. Finkebeiner, supra.

Petitioner argues that Respondent's claims that the City of Staunton did not file a detainer but merely gratuitously obtained custody of Petitioner from Roanoke County authorities, exacerbates and not diminishes the claimed violation of IADA, ARTICLE IV (c) and V (2) (c), if such an admission is to be accepted from Respondent's assertions in the Brief for Respondent at page (4), Id.

Moreover, the evidence that the trial court specifically shunted considerations of the Petitioner's Motion to Dismiss the Indictment from consideration under the IADA Article IV (c) and V (2) (c) under which it had been presented in favor of determination under the Virginial speedy trial state statute, clearly established that the court's determination rejected any application of the Interstate Agreement on

Detainers binding on the Court. SEE: Respondent's Appendix at A-20, Id.

(iv) Respondent therefore does not deny that the trial court refused to consider and determine the appliability of the IADA provisions, and that therefore, the judgment of the trial court should have been rejected by the United States District Court and the Court of Appeals.

Petitioner argues that the IADA is subject to federal construction, as a federal law, and its provisions must also be applied as an agency law under the general rule that:

> "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous

than otherwise would be required." SEE: United States v. Caceres, 440 U.S. 741, 751-752 n.14, 99 S.Ct. 1465, 1471, n.14, 59 L.Ed.2d 733 (1979); quoting Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed. 2d 270; United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 .Ed. 681; Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed. 2d 1403; Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed. 2d 1012; Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed. 2d 778.

Respondent has not denied that under the State IADA procedures, dismissal is not mandated, but seeks to evade the procedures as fortuitously and gratuitously as he claims custody of Petitioner was obtained

without the filing of any detainer. Petitioner argues that gratuitous use of federal and agency law without properly seeking jurisdiction under the law or complying with the limitations of prosecution thereunder, is specifically forestalled by the enactment and intendment of the Interstate Agreement on Detainers Act. SEE: Carchman v. Nash, 105 S.Ct. at 3403-04, 3407; Wirth v. Surles, 562 F.2d 319, 321-22 (4th Cir. 1977).

Article V (2) (c), Code of Virginia (1950) section 53.1-210, as amended, provides:

> "If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is

not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice and any detainer thereon shall cease to be of any force and effect." SEE: section 53.1-210, Id.

Petitioner argues that Respondent's lugubriously asserts, that although Staunton filed [and was required to file] a detainer against him on January 25, 1983, and again on February 25, 1983, at the same time that Roanoke County sought temporary custody of Petitioner on the basis of their own detainers; Roanoke County can determine that there was a violation of Article V (2) (c) of the IADA,

but that the City of Staunton which tried Petitioner considerably AFTER Roanoke County, is justified in finding that there has been no violation of the said provisions.

Petitioner submits that this lugubrious assertion must failed, since the Roanoka County Circuit Court tried Petitioner BEFORE the City of Staunton, and chronologically, the City of Staunton was compelled to find likewise.

Petitioner respectfully submits, that this view is conclusively reaffirmed by the dismissal of the pending indictments against him in the City of Briston AFTER the Circuit Court of Staunton failed to dismiss their indictments.

MOREOVER, Petitioner moves this Honorable Court to note that Respondent has not addressed the

precise question on which certiorari is sought and which formed the basis of the lower federal courts' decisions; to-wit: the required sanction under IADA Article IV (c) and V (2) (c) following a determination of violation of these Articles by the receiving state.

What Respondent avers in response has been conclusively determined against Virginia by the specific factual finding of the District Court.

The Court found as a matter of that that there was a violation of Article V (2) (c) of the IADA, but, based upon its determination that prejudice should be shown for such a violation under Kerr v. Finkbeiner, supra, irrespective of the conflicts between the Circuits on this issued, denied relief to Petitioner.

The District Court further found that Petitioner had alleged prejudice, but held:

"Petitioner has alleged prejudice in that he was unable to earn money or paticipate in various rehabilitative programs during the delay. This is not the type of prejudice which constitutes a fundamental defect and which will justify invalidation of a criminal conviction." SEE: Respondent's Appendix at A-8, Id.

Petitioner therefore argues, that Respondent has not been responsive to the issue of conflicts between the Circuits on the issue of the requirement of prejudice or whether viewed under Carchman v. Nash, supra, or United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834 (1978); United States v. Sorrell, 436 U.S. 949, 98 S.Ct. 2528 (1978), prejudice is definitely required so as to affirm the decision of Kerr v.

Finkbeiner, supra, over the holdings of the other Circuits which holds to the contrary view in resolving these issues. SEE: Respondent's Brief 7-9.

The fact that Respondent has NOT addressed the issue on certiorari which evolves from the decision which Respondent admits that he relied upon in the lower courts, is therefore submitted as deliberate evasion of the duty to respond to the substantial federal question before the Court posed from the conflicts specifically determined by the Court of Appeals below.

Petitioner Harris argues, that whether viewed under the requirements of Code of Virginia (1950), section 53.1-210, Article V (2) (c), or under the holdings of this Court in United States v. Mauro, supra, and Carchman v. Nash, supra, some

determination must be made by the trial court whether (i) the state law mandates greater protections than the federal construction placed on the same statute so as to enforce it under the due process standards of United States v. Caceres, supra, or (ii) whether prejudice is subsumed in shunting the prisoner back and forth from one jurisdiction to another in excess of the time limitation imposed under the IADA provisions so as to deny the prisoner substantial benefits towards ultimately seeking his release from sundry jurisdictions through their rehabilitative programs; or (iii) whether prejudice is uniformally required both under the federal and state construction of the Interstate Agreement on Detainers Act; or (iv) whether the Circuits which have determined that prejudice is NOT required

should be affirmed by this Court's implicit holdings in Carchman v. Nash, supra; or (v) should more prejudice be alleged and proven than the deprivation of these rights to rehabilitation and institutional proceedings which the IADA is established to protect through its intendment?

WHEREFORE, Petitioner prays that this Honorable Court will note that Respondent has not been responsive to the issues in this proceeding, and that the substantial federal questions raised meets all the prerequisites of the Court's certiorari jurisdiction sufficient to merit the granting of the Petition.

II.

Whether the jurisdictional claim of COLLATERAL ESTOPPEL under Code of Virginia (1950) section 53.1-210, V (2) (c), can be raised under Rule 12 (h) (1), Fed. Rules Civ. Proc., 28 U.S.C., at any time in the proceedings to resolve the case before the Court?

Petitioner has heretofore averred that the jurisdictional claim of collateral estoppel based on the determination by the Circuit Courts of Roanoke County and the City of Bristol, Virginia, bars his conviction under the mandatory dismissal required for violations of Code of Virginia (1950), section 53.1-210, Article V (2) (c), Code of Virginia, as amended.

Respondent, by counsel, has contended that under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), a defense of collateral estoppel raised for the first time in the Court of Appeals, cannot be considered in a consequent Petition for Writ of Certiorari to this Court.

Petitioner Harris respectfully submits, that a defense of the lack of jurisdiction can be raised at any time under Rule 12 (h) (1), Fed. Rules Civ. Proc., 28 U.S.C., and that Sykes, supra, has never been extended to bar considerations of any claims of lack of jurisdiction by the trial court under mandatory provisions of State law. SEE: Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680 (1974); Murray v. Carrier, __ U.S. ___, 106 S.Ct. 2639 (1986); Murray v. Smith, __ U.S. __, 106 S.Ct. 2661 (1986).

Petitioner avers that the provisions of section 53.1-201, Code of Virginia, mandates dismissal of untried indictments as determined by the Circuit Courts of Roanoke County and the City of Bristol.

The view of these Courts that the said statutory provisions are mandatory in character and intendment, is therefore urged on this Court under the aegis of COLLATERAL ESTOPPEL accrued from the effect of these judgments made by the other Virginia Courts finding that the untried indictments should be dismissed under the said state statute.

WHEREFORE, Petitioner prays that this Honorable Court will determine that collateral estoppel should apply to impose the limiations on prosecution under Code of Virginia, section 53.1-210, as held by other courts which have resolved the said

issue thereof. SEE: Lee v. Winston, 717 F.2d 888, 895 (4th Cir. 1983); Allen v. McCurry, 449 U.S. 90, 94-96, 101 S.Ct. 411, 414-15 (1980); Montana v. United States, 447 U.S. 147, 153, 99 S.Ct. 970, 973 (1979); Clodfelter v. Commonwealth, 218 Va 98 235 S.E. 2d 340 (1977).

Respectfully Submitted,

By: Richard Page Harris

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CONCLUSION

Based on the show in the foregoing that there is admission by the United States Court of Appeals for the Fourth Circuit that there is conflict among the Circuits on the application of the Interstate Agreement on Detainers Act under this Court's holding in United States v. Mauro, supra; and Carchman v. Nash, supra; and whether the federal construction or recognized under United States v. Caceres, supra, under its own criteria and mandatory provisions; Petitioner prays that the Petition for Certiorari to the judgment of the Court of Appeals will be granted and relief granted accordingly remanding the case to the Appeals Court with instruction to dismiss the indictment in accordance

with IADA Article V (2) (c), Code of Virginia (1950), section 53.1-210, as amended.

Respectfully Submitted,

By: Richard Page Harris
Richard Page Harris, Pro Se

Subscribed and sworn to before me
this ___ day of _____
1986.

My Commission Expires: _____

_____
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies of the foregoing: "Petitioner's Reply to Respondent's Opposition to Granting of Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit," was mailed to Mr. Richard B. Smith, Assistant Attorney General, 101 North 8th Street, Richmond, Virginia 23219, on the 19 day of November, 1986.

Respectfully Submitted,

By: Richard Page Harris

Richard Page Harris, Pro Se